

1 PAT LUNDVALL (NSBN 3761)
2 KRISTEN T. GALLAGHER (NSBN 9561)
3 McDONALD CARANO WILSON LLP
4 2300 W. Sahara Avenue, Suite 1200
5 Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966
lundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com

6 SANDRA C. McCALLION (admitted *pro hac vice*)
7 S.C. SOHN (admitted *pro hac vice*)
THOMAS E. BEZANSON (admitted *pro hac vice*)
CHRISTOPHER M.P. JACKSON (admitted *pro hac vice*)
8 MATTHEW V. POVOLNY (admitted *pro hac vice*)
COHEN & GRESSER LLP
9 800 Third Avenue, 21st Floor
New York, NY 10022
Phone: 212.957.7600
Fax: 212.957.4514
smccallion@cohengresser.com
scsohn@cohengresser.com
tbezanson@cohengresser.com
cjackson@cohengresser.com
mpovolny@cohengresser.com

14 *Attorneys for Defendant LG ELECTRONICS USA, INC.*

15
16 **UNITED STATES DISTRICT COURT**
17 **DISTRICT OF NEVADA**

18 KEVIN DROVER, individually and on behalf
of all others similarly situated,

Case No.: 2:12-cv-00510-JCM-VCF

19 Plaintiffs,
20 vs.

**DEFENDANT LG ELECTRONICS USA,
INC.'S MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED
COMPLAINT**

21 LG ELECTRONICS USA, INC.,

22 Defendant.

23 Defendant LG Electronics USA, Inc. ("LGUSA") hereby moves to dismiss Plaintiff's
24 First Amended Complaint ("Amended Complaint" or "FAC") pursuant to Rule 12(b)(6) of the
25 Federal Rules of Civil Procedure. For the reasons stated herein, LGUSA respectfully requests
26 that the Court dismiss the Amended Complaint in its entirety and with prejudice.

27 ...

28 ...

This motion is based upon the record in this matter, the Points and Authorities that follow, and any argument of counsel entertained by the Court.

DATED this 7th day of October, 2013.

McDONALD CARANO WILSON LLP

By: /s/ Pat Lundvall

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
2300 W. Sahara Avenue, Suite 1200
Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966
lundvall@mcdonaldcarano.com
kgallagher@mcdonaldcarano.com

Sandra C. McCallion (admitted *pro hac vice*)
S.C. Sohn (admitted *pro hac vice*)
Thomas E. Bezanson (admitted *pro hac vice*)
Christopher M.P. Jackson (admitted *pro hac vice*)
Matthew V. Povolny (admitted *pro hac vice*)
COHEN & GRESSLER LLP
800 Third Avenue, 21st Floor
New York, NY 10022
Phone: 212.957.7600
Fax: 212.957.4514
smccallion@cohengresser.com
scsohn@cohengresser.com
tbezanson@cohengresser.com
cjackson@cohengresser.com
mpovolny@cohengresser.com

Attorneys for Defendant LG ELECTRONICS USA, INC.

POINTS AND AUTHORITIES

I. INTRODUCTION

With his Amended Complaint, Plaintiff Kevin Drover once again attempts to assert claims on behalf of himself and a purported class consisting of all Nevada purchasers of certain plasma and LCD televisions (the “Televisions”) sold by LGUSA. He purports to bring claims under the Nevada Deceptive Trade Practices Act (the “NDTPA” or the “Act”) (First Cause of Action), contending that LGUSA deceived consumers by misrepresenting that the Televisions were not defective.¹

¹ Drover also asserts a claim for unjust enrichment (Second Cause of Action) and represents in his Motion for Leave to Amend that this claim is asserted here solely to preserve the claim for appeal.

1 In its October 18, 2012 decision (“Order”) (Doc. 49) granting in part LGUSA’s Motion to
 2 Dismiss Drover’s original Complaint, the Court dismissed Drover’s consumer fraud claim under
 3 the NDTPA – the same claim advanced here – on pleading grounds. The Court held that the
 4 “formulaic” and “conclusory” allegations offered to support the claim were deficient under Rule
 5 8, emphasizing that Drover had failed even to specify “which portion of the statute” had
 6 assertedly been “violated.” Order at 4. The Court also concluded that dismissal was required
 7 under Rule 9(b) because Drover had “chose[n] to allege fraud, consequently summoning Rule 9
 8 review,” and that he had failed to plead his claim with the particularity required by the Rule. *Id.*
 9 at 3-4.

10 Drover’s Amended Complaint does not resolve these fatal flaws. Although Drover has
 11 made some cosmetic changes and added a few details to the allegations in his original
 12 Complaint, he still has failed to plead his consumer fraud claim sufficiently under either Rule 8
 13 or Rule 9(b).

14 Most notably, Drover has *again* failed to identify any specific section or sections of the
 15 NDTPA as the basis for his claim. Despite clear guidance from the Court that “at a minimum”
 16 he was required to provide “notice as to what law was allegedly violated,” Order at 4, Drover
 17 still has not revealed which of the numerous “deceptive trade practices” listed in the statute
 18 LGUSA allegedly committed. For this reason alone, Drover’s NDTPA claim should be
 19 dismissed. Further, because the Court expressly directed Drover to cure this flaw, and he failed
 20 to do so, his claim should be dismissed with prejudice. *See* Part IVA.

21 Drover’s failure to identify the statutory provision is telling. Despite his strained efforts
 22 to avoid using words that sound like fraud, the NDTPA claim is plainly rooted in fraud: Drover
 23 alleges that LGUSA made material representations that its Televisions were not defective, which
 24 apparently Drover contends were false; purchasers relied upon those representations to purchase
 25 the Televisions; and they suffered damages as a result. These are averments of fraud that are
 26 subject to the enhanced pleading requirements of Rule 9(b), yet Drover has not alleged a single
 27 circumstance of *any* specific misrepresentation. Accordingly, for this additional reason, his
 28 claim must be dismissed. *See* Part IVB.

1 Drover has been afforded the opportunity to amend his claims and yet failed to remedy
 2 the deficiencies identified by the Court. He did not heed the Court's directive for a simple
 3 reason: he cannot truthfully provide the necessary allegations. Thus, no purpose would be
 4 served by affording him yet another opportunity to amend. LGUSA therefore seeks dismissal
 5 with prejudice. *See* Part IVC.

6 **II. STATEMENT OF FACTS**

7 The Amended Complaint is largely identical to Drover's original Complaint and recites
 8 most of the same allegations asserting that LGUSA knew that its Televisions allegedly were
 9 defective while representing that they were not. Specifically, the Amended Complaint alleges
 10 that the Televisions sold by LGUSA were defective, and that LGUSA had "actual knowledge" of
 11 the alleged defect. FAC ¶¶ 7-9, 11. LGUSA purportedly represented that its Televisions were
 12 not defective and denied the existence of the alleged defect. *Id.* ¶¶ 16-17. Drover asserts that
 13 this alleged defect was a material fact, *id.* ¶ 12; purchasers relied on LGUSA's representations
 14 that the Televisions were not defective, and they would not have purchased the Televisions had
 15 they known the truth. *Id.* ¶¶ 12, 16. Finally, Drover asserts that purchasers suffered damages as
 16 a result of their purchases, including the price they paid for the Televisions, repair costs, and
 17 other expenses. *Id.* ¶¶ 14-17, 20.

18 Drover now alleges that he purchased his television "[s]ome time in late 2008." FAC ¶ 4.
 19 Drover concedes that the warranty had expired, and he alleges that LGUSA declined to pay for
 20 repairs outside the warranty period. FAC ¶¶ 4, 13.

21 **III. LEGAL STANDARDS**

22 To survive a motion to dismiss under Rules 8 and 12(b)(6), a complaint must plead
 23 "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*,
 24 550 U.S. 544, 570 (2007). It must contain factual allegations that "raise a right to relief above
 25 the speculative level." *Twombly*, 550 U.S. at 555. A claim will have "facial plausibility" only
 26 when the plaintiff "pleads factual content that allows the court to draw the reasonable inference
 27 that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678
 28 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory

1 statements, do not suffice.” *Id.* (citing *Twombly*, 550 U.S. at 555). Accordingly, “where the
 2 well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct,”
 3 the allegations do not support a claim for relief. *Id.* at 679.

4 Under Rule 9(b), all allegations of fraud must be pleaded with particularity, including “an
 5 account of the time, place, and specific content of the false representations as well as the
 6 identities of the parties to the misrepresentations.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764 (9th
 7 Cir. 2007) (internal citation and quotation omitted). The plaintiff also must “set forth what is
 8 false or misleading about a statement, and why it is false.” *Yourish v. Cal. Amplifier*, 191 F.3d
 9 983, 993 (9th Cir. 1999) (quoting *In re GlenFed Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994));
 10 *Cafasso ex rel. United States v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir.
 11 2011) (quoting *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010)). Even
 12 if a claim does not require a plaintiff to allege fraud, if his supporting averments rest on fraud,
 13 those averments are subject to Rule 9(b). *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-
 14 04 (9th Cir. 2003).

15 **IV. ARGUMENT**

16 A. Drover Does Not Identify Any NDTPA Provision As The Basis For His Claim.

17 The first and most glaring defect requiring dismissal is Drover’s refusal to identify the
 18 section under which he purports to bring his NDTPA claim. The Court dismissed Drover’s
 19 original NDTPA claim, in part, because he had failed to state the “specific sections of the
 20 [NDTPA] on which his complaint relie[d].” Order at 4. The Court then specifically instructed
 21 Drover that, “at a minimum,” he was required to provide “notice as to what law was allegedly
 22 violated.” *Id.*

23 The Amended Complaint does not provide this minimum notice. Drover’s only citations
 24 to the NDTPA in the Amended Complaint refer to the entire statute as “NRS 598.0903 *et seq.*”
 25 FAC ¶ 31. Under NRS 41.600(2)(e), a plaintiff may bring an action for any one of the numerous
 26 “deceptive trade practices” within the definition of “consumer fraud,” which embraces all the
 27 practices listed in NRS 598.0915-598.0925. Without knowing which “deceptive trade practice”
 28

1 LGUSA is accused of, neither LGUSA nor the Court has any notice of the legal claim Drover's
 2 allegations are intended to support. Order at 4.

3 Because he has failed to state the portion of the NDTPA on which he relies, Drover's
 4 claim is, once again, fundamentally deficient under both Rule 8 and Rule 9(b). Order at 4. It
 5 should again be dismissed, this time with prejudice.

6 B. Drover Has Failed To Plead His NDTPA Claim With The Particularity Required
 7 By Rule 9(b).

8 Reading the Amended Complaint, it is plain to see that Drover's NDTPA claim is based
 9 on accusations of fraud and relies upon sections of the statute that sound in fraud. *See, e.g.*, NRS
 10 598.0915(5), (15). As the Court noted in its Order dismissing the NDTPA claim alleged in
 11 Drover's original Complaint, Rule 9(b) requires that fraud claims *must* be pleaded with
 12 particularity. *See* Order at 2-3.

13 Rather than providing the necessary particularized allegations sufficient to support his
 14 NDTPA claim, Drover has instead attempted to rescue his pleading by *removing* any word
 15 related to "false" or "fraud" in an unsuccessful attempt to disguise the true nature of his claim
 16 and evade the Rule 9(b) requirements he plainly cannot meet. *See, e.g.*, original Complaint ¶ 16
 17 ("The fraudulent acts of concealment by LG included the intentional concealment and refusal to
 18 disclose facts known to LG about the Defect in the Televisions . . ."); ¶ 21 ("By engaging in the
 19 above described conduct, LG committed acts and omissions with actual malice . . .") Whether he
 20 uses words evoking "fraud" or not, the Amended Complaint reeks of consumer fraud allegations
 21 and is the only possible ground for a claim under the NDTPA.

22 A simple analysis of the elements reveals the true basis of Drover's claim. As the Court
 23 noted in its Order, "the basic elements . . . for a successful private consumer fraud claim brought
 24 under the" NDTPA are "(1) an act of consumer fraud by the defendant (2) caused (3) damage to
 25 the plaintiff." Order at 3 (quoting *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 658 (D. Nev.
 26 2009)). The Amended Complaint alleges each of these key elements, albeit in entirely
 27 conclusory terms that fall far short of the particularity required. Specifically, Drover alleges the
 28 first element – an act of consumer fraud – in three ways:

- LGUSA represented that its Televisions were not defective and denied the existence of the alleged defect, FAC ¶¶ 16-17;
- LGUSA knew the Televisions allegedly were defective, *id.* ¶¶ 11-12; and
- these “representations” – that the Televisions were not defective when allegedly they were – were material. *Id.* ¶¶ 12, 16.

Drover alleges the second element, causation, by asserting that purchasers relied on the representations that the Televisions were not defective when they were – in purchasing the allegedly defective Televisions sold by LGUSA. *Id.* ¶¶ 6, 12, 16, 18. Finally, with the allegation that the purchasers suffered damages, *id.* ¶¶ 14-17, 20, Drover alleges the final element of fraud noted by the Court in its Order dismissing the NDTPA claim.

These allegations – that LGUSA knowingly sold defective Televisions – are sufficient to bring the Amended Complaint within the ambit of Rule 9(b). As the Ninth Circuit held in *Vess v. Ciba-Geigy*, “[f]raud can be averred by . . . alleging facts that necessarily constitute fraud (*even if the word ‘fraud’ is not used*),” and these allegations must be scrutinized under the Rule 9(b) standard. *Vess*, 317 F.3d at 1105 (emphasis supplied). A plaintiff cannot avoid the pleading requirements of Rule 9(b) “simply by avoiding the use of that magic word.”² *Id.* at 1108. This Court, citing *Vess*, noted in dismissing the NDTPA claim in Drover’s first Complaint that, even if fraud is not an essential element of a plaintiff’s legal claim, any averments of fraud made to support that claim are still covered by the Rule. *See* Order at 3.

Although, as noted, Drover carefully avoids use of the “magic word,” as shown above his allegations plainly sound in fraud, which means that these allegations must be pled with particularity. As with the original Complaint, however, the allegations in the Amended Complaint are entirely devoid of the particularity required by Rule 9(b). The Amended Complaint does not identify a single communication in which LGUSA made any alleged misrepresentation. The Amended Complaint does not specifically allege or even hint at who at LGUSA falsely represented to anyone, let alone any putative plaintiff, that the Televisions were not defective; who at LGUSA denied the existence of the alleged defect; when such alleged false

² Even if a plaintiff presents both fraud and non-fraud allegations in support of a claim, his averments of fraud are still subject to the Rule, and those not pleaded with the required particularity must be “disregarded.” *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009); *Vess*, 317 F.3d at 1105.

1 representations were made; or where such alleged false representations were made. *See* FAC ¶¶
 2 16-17. Nor does the Amended Complaint provide any facts that would support the conclusory
 3 allegation that LGUSA knew the Televisions allegedly were defective. *See id.* ¶¶ 11-12. The
 4 Amended Complaint's vague reference to unspecified "complaints found on the Internet"
 5 certainly does not support any such inference; the reference does not identify what was said,
 6 when it was allegedly said, or even a website. *Id.* at ¶ 11. Tellingly, the Amended Complaint
 7 does not contain a single word quoted from any statement or communication – or even a
 8 summary of such statement or communication – by LGUSA that would constitute a
 9 misrepresentation. In short, the Amended Complaint, like its predecessor, is utterly devoid of
 10 any particularity and thus falls far short of the Rule 9(b) standard it must meet. The Court should
 11 therefore dismiss the NDTPA claim with prejudice.

12 C. All Drover's Claims Should Be Dismissed With Prejudice.

13 The Court should dismiss the entire Amended Complaint with prejudice.³ Despite
 14 receiving clear guidance from the Court, and from extensive briefing in the prior motion to
 15 dismiss, Drover has failed to state a cause of action. He has had his chance. Where, as here, a
 16 plaintiff has had the chance to amend his complaint and failed to cure its deficiencies, the Court
 17 is entitled to exercise its discretion and deny further leave to amend. *See City of Los Angeles v.*
 18 *San Pedro Boat Works*, 635 F.3d 440, 454 (9th Cir. 2011) (discretion to deny leave to amend
 19 particularly broad where plaintiff has previously amended complaint); *Ascon Props., Inc. v.*
 20 *Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989) (same); 3 James Wm. Moore et al. *Moore's*
 21 *Federal Practice*, § 15.15[1] (2012).

22 ...

23 ...

24 ...

25 ...

26 ³ Drover has renewed his unjust enrichment claim in his Amended Complaint, which is identical
 27 to the claim dismissed with prejudice in the Court's February 19, 2013 Order granting LGUSA's
 28 Motion for Reconsideration. As Drover indicated in his Motion for Leave to Amend his
 Complaint, the unjust enrichment claim appears in the Amended Complaint solely because
 Drover wishes to preserve the option of appealing the earlier dismissal. Plaintiff's Motion for
 Leave to Amend at 6. The claim should accordingly be dismissed.

V. CONCLUSION

For the reasons set forth above, LGUSA respectfully requests that the Amended Complaint be dismissed with prejudice.

DATED this 7th day of October, 2013.

McDONALD CARANO WILSON LLP

By: /s/ Pat Lundvall

Pat Lundvall (NSBN 3761)
Kristen T. Gallagher (NSBN 9561)
2300 W. Sahara Avenue, Suite 1200
Las Vegas, NV 89102
Telephone: 702.873.4100
Facsimile: 702.873.9966
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Phone: 212.957.7600
Fax: 212.957.4514
smccallion@cohengresser.com
scsohn@cohengresser.com
tbezanson@cohengresser.com
cjackson@cohengresser.com
mpovolny@cohengresser.com

Attorneys for Defendant LG ELECTRONICS USA, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP, and that on this 7th day of October, 2013, I caused a true and correct copy of the foregoing **DEFENDANT LG ELECTRONICS USA, INC.'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** to be served via the U.S. District Court's Notice of Electronic Filing ("NEF") in the above-captioned case, upon the following:

Dennis L. Kennedy, Esq. (NSBN 1462)
Joseph A. Liebman, Esq. (NSBN 10125)
BAILEY KENNEDY
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
Telephone: (702) 562-8820
Facsimile: (701) 562-9921
dkennedy@baileykennedy.com
jliebman@baileykennedy.com

WILLIAM B. FEDERMAN
FEDERMAN & SHERWOOD
10205 N. Pennsylvania Avenue
Oklahoma City, Oklahoma 73120
Telephone: (405)235-1560
Facsimile: (405) 239-2112
wbf@federmanlaw.com
(admitted *pro hac vice*)

Attorneys for Plaintiff Kevin Dровер

/s/ Marianne Carter
An employee of McDonald Carano Wilson LLP

285537